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No. 96-1307

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM DUNCAN, Warden, *Petitioner,*

v.

RONNIE EARL BAYLOR, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

If a state court denies a state prisoner a meaningful adjudication of a meritorious federal constitutional claim in state court proceedings and then denies relief without citation or explanation, must the federal court nonetheless "defer" to the state court's unexplained denial of relief under Title 28, U.S.C. section 2254(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?

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Respondent Ronnie Earl Baylor (hereafter "respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari (hereafter "Petition") filed by petitioner William Duncan (hereafter "petitioner"). This case presents no compelling reasons requiring review by this Court. See S. Ct. R. 10.

STATEMENT OF THE CASE

Several months before respondent's trial on charges of forcible rape and sodomy, a criminalist in the Sheriff's Crime Laboratory issued a report stating his preliminary results tended to eliminate respondent as the donor of semen found on one of the victims, and that further testing could resolve the issue conclusively. Respondent's trial counsel, although aware of the report, neither had respondent's semen tested further nor followed up with the Sheriff's Crime Laboratory criminalist.

Trial counsel did not serve a subpoena on the criminalist until after the trial had already begun; the criminalist, however, was on vacation. Without the criminalist's testimony, the report was ruled inadmissible. *Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir. 1996).

No witness identified respondent as the perpetrator and no physical evidence linked him to the crimes. The prosecution introduced evidence of respondent's confessions to the offenses. Respondent testified at trial, recanted his confessions, and offered an alibi for one of the offenses. Respondent was convicted on all counts and sentenced to 16 years in custody; his conviction and sentence were affirmed on appeal. *Id.*

On June 19, 1990, respondent filed a state habeas corpus petition *in propria persona*. In that petition, respondent alleged, *inter alia*, that trial counsel's failure to get the criminalist's report admitted into evidence denied him the effective assistance of counsel. On August 15, 1990, the California Supreme Court denied respondent's petition without a hearing. The state court's opinion states, *en toto*: "Petition for writ of habeas corpus DENIED." Petitioner's Appendix C.

After initially denying respondent's application for federal habeas corpus relief, the federal district court granted respondent's motion for relief from judgment and ordered serological testing of respondent's seminal fluid. Both a defense expert and an independent expert concluded respondent's semen was genetically incompatible with that recovered from the victim. The district court found the conclusion of the state's expert that the serological evidence did not exclude respondent to be "without scientific foundation." *Baylor*, 94 F.3d at 1324-25. The district court granted the writ, concluding counsel did not provide reasonably effective assistance and respondent was therefore entitled to relief under *Strickland v. Washington*, 466 U.S. 688 (1984). *Id.* at 1323. The state appealed.

While the case was pending on appeal before the United States Court of Appeals for the Ninth Circuit, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). At petitioner's request, the court of appeals ordered supplemental briefing on the implications of the AEDPA for this case. In his supplemental brief, petitioner conceded the evidentiary hearing before the district court was proper at the time, but argued that it had "become irrelevant" in light of the AEDPA's amendments to 28 U.S.C. § 2254(d), and the court of appeals should disregard the serological evidence presented to the district court.

The court of appeals panel unanimously concurred in the district court's decision that respondent demonstrated both the inadequacy of trial counsel's performance and prejudice resulting therefrom, and was therefore entitled to relief. *Baylor*, 94 F.3d at 1323. The court noted that the criminalist's report, which recommended further serological testing to exclude respondent as the semen donor, was only "one test away from tilting the scale powerfully in Baylor's direction," but "[e]ven without further testing [the] report would have greatly decreased the odds that Baylor was the donor . . . and buttressed the credibility of Baylor's alibi and recantation at trial." *Id.* at 1324. Moreover, the court's "confidence in the outcome of the trial [was] shaken by the results of the test on Baylor's semen" that had been ordered by the district court; the test excluded Baylor as the semen donor. *Id.*

The court of appeals rejected the state's suggestion that the AEDPA required it to disregard the serological evidence presented to the district court, noting that the federal evidentiary hearing was "Baylor's first chance to develop the factual basis of this claim." *Id.* at 1325. In addition, the court concluded the AEDPA did not affect respondent's entitlement to relief:

> . . . whether or not the Act applies to pending appeals, our decision would be the

same. Section 2254(d), upon which the state relies in this case, provides that a writ of habeas corpus shall not issue unless the petitioner establishes that the state court decision was contrary to clearly established federal law as determined by the United States Supreme Court. In this case, the state court decision was contrary to clearly established federal law determined by the Court in *Strickland.*

Id.

REASONS WHY THE PETITION SHOULD BE DENIED

First, the AEDPA has no application to cases pending at the time of its enactment. As the Court will consider the Act's application to pending cases in *Lindh v. Murphy*, No. 96-6298, respondent will not address that issue in any greater detail here. However, because the AEDPA does not apply, this case presents only a straightforward issue of counsel's ineffectiveness. The showing required to demonstrate the ineffective assistance of counsel, has been well-established since *Strickland v. Washington*, 466 U.S. 668 (1984). This court need not grant certiorari to reaffirm that counsel's failure to investigate and present obviously exculpatory evidence deprives a criminal defendant of the effective assistance of counsel.

Moreover, assuming *arguendo* that the AEDPA applies to respondent's case, there is no conflict among the courts of appeal as to whether a *de novo* standard of review is appropriate under the Act when a state court fails to meaningfully adjudicate a state prisoner's federal constitutional claims. When respondent presented his Sixth Amendment claim to the California Supreme Court in his state habeas petition, the state court provided respondent no opportunity for further factual or legal development, and summarily rejected the claim in an unexplained decision. The lower federal courts concur that such proceedings do not constitute a meaningful adjudication sufficient to satisfy the prerequisites for application of amended 28 U.S.C. § 2254(d)(1), and no "deference" to the state court's decision is required.

Next, assuming *arguendo* that the prerequisites for application of section 2254(d)(1) to respondent's case are met and there exists a conflict between the decision below and those of the courts of appeal in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted in part*, 117 S.Ct. 726 (1997), and *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *petition for cert. filed* (Jan. 6, 1997) (No. 96-7359), the petition for writ of certiorari should still be denied. The resolution of any perceived conflict is irrelevant to the outcome of this case. Even under the interpretation given section 2254(d)(1) by the courts of appeal in *Lindh* and *Drinkard* -- that habeas relief can be granted on mixed questions of law and fact only if the federal court determines the state court application of controlling Supreme Court precedent was "unreasonable" -- respondent is nonetheless entitled to relief on his ineffective assistance of counsel claim. *See Hall v. Washington*, ___ F.3d ___, 1997 WL 42967 (7th Cir. Feb. 4, 1997); *Berryman v. Morton*, 100 F.3d 1089 (3rd Cir. 1996).

Finally, the court of appeals applied the correct standard when it determined respondent was entitled to relief under amended section 2254(d)(1) because the state court's decision denying relief was "contrary to" clearly established law as enunciated in *Strickland v. Washington*. The Ninth Circuit's interpretation of section 2254(d)(1) is wholly consistent with both that section's statutory language, its legislative history, and the fundamental role of Article III judges in our constitutional system.

I.
THERE ARE NO CONFLICTS AMONG THE COURTS OF APPEAL BECAUSE RESPONDENT WAS NOT PROVIDED A MEANINGFUL ADJUDICATION OF HIS CLAIM IN STATE COURT.

Petitioner asserts that certiorari is appropriate because the Ninth Circuit's decision in this case conflicts with those in *Lindh* and *Drinkard*. Despite petitioner's protestations, the decisions of the

courts of appeal do not conflict. Because respondent was not provided a meaningful adjudication of his ineffective assistance of counsel claim in his state habeas corpus proceedings, and the California Supreme Court summarily rejected respondent's claim in an unexplained "order" denial, the Fifth and Seventh Circuits would have reached exactly the same result as did the Ninth Circuit here.

Congress' intent in amending 28 U.S.C. § 2254(d) was to preclude federal habeas courts from relitigating constitutional claims that were fully litigated, thoughtfully considered, and correctly decided in the state courts. Underlying the additional respect afforded state court decisions under §2254(d)(1) is the statutory premise that state courts meaningfully address federal constitutional claims, and put forth their best independent judgment after the relevant facts and law have been fully developed and assessed with care and deliberation. Only when a state court decision, and more importantly, the path followed in reaching that decision, reflects such vigilance for the preservation of federal rights is it entitled to weighty consideration by a federal court on habeas review.

That a careful state court deliberative process is a prerequisite to application of section 2254(d)(1) is clear from the statutory language. Section 2254(d) states that "[a]n application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- resulted in a decision . . ." Thus, section 2254(d)(1) is applicable if, and only if, a petitioner's claim was "*adjudicated* on the merits," and that *adjudication* "resulted in a *decision*" by the state court.

Not surprisingly, the courts of appeal which have considered the issue concur that before section 2254(d)(1) can be applied, a federal court must first examine the threshold question of whether the state court rendered a decision that was meaningfully adjudicated. *Drinkard*, 97 F.3d at 768 ("In applying § 2254(d)(1), as amended by the AEDPA, we must first determine whether Drinkard's claim

regarding the challenged instruction during the sentencing phase of his trial was adjudicated on the merits in state court proceedings."); *Lindh*, 96 F.3d at 871 ("§ 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.") That is, the federal court must determine if the state court's decision follows an opportunity for full factual and legal development of constitutional issues, and whether that decision reflects the level of deliberation essential to the accurate resolution of those constitutional issues. *Neal v. Gramley*, 99 F.3d 841, 843 (7th Cir. 1996) (section 2254(d)(1) does not apply to a state court's determination of constitutional claim unless "the determination was made after the petitioner had a full and fair opportunity to litigate the issue"); *Lindh*, 96 F.3d at 871 ("a responsible, thoughtful answer reached after a full opportunity to litigate is adequate" to allow application of section 2254(d)(1).)

The lower federal courts have considered various factors relevant to the determination of whether a claim was adjudicated in a meaningful way by the state courts: (1) whether the state court conducted an evidentiary hearing, *Moore v. Johnson*, 101 F.3d 1069, 1075 (5th Cir. 1996); *Curtis v. Class*, 939 F. Supp. 703, 708 (D.S.D. 1996); (2) whether the state court heard testimony or received evidence from both parties, *Moore*, 101 F.3d at 1075; *Neal*, 99 F.3d at 843; (3) whether the state court appointed counsel, *Curtis*, 939 F. Supp. at 708; (4) whether the state court appointed defense experts, *id.*; and (5) whether the state court issued detailed findings of fact and conclusions of law in support of its judgment, *Moore*, 101 F.3d at 1075; *Drinkard*, 97 F.3d at 768.

If no meaningful adjudication was conducted by the state court, then the policies and legislative assumptions underlying application of section 2254(d)(1) are absent and the provision cannot be applied. If section 2254(d)(1) does not apply, then the federal court reviews the federal constitutional claims *de novo*. *Lockhart v. Johnson*, 104 F.3d 54, ___, 1997 WL 7311 at *4 (5th Cir.

1997).

Here, the California Supreme Court held no evidentiary hearing on respondent's ineffective assistance of counsel claim. Respondent proeeeded *in propria persona* and was provided no expert assistance. No testimony nor evidence was received from either party. No findings of fact nor conclusions of law accompanied the state court's decision. Rather, the court issued a summary, unexplained order stating only, "Petition for writ of habeas corpus DENIED." Petitioner's Appendix C. As the Ninth Circuit noted, the evidentiary hearing held by the federal district court was respondent's "first chance" to develop the factual basis of his ineffective assistance of counsel claim. *Baylor*, 94 F.3d at 1325. None of the various factors considered by the lower federal courts to be prerequisites for application of section 2254(d)(1) are present in this case. As a result, all would concur that the Ninth Circuit's plenary consideration of respondent's Sixth Amendment claim was entirely appropriate.

Certiorari is appropriate to resolve conflicts among the courts of appeal in cases "in which the facts are substantially similar and the issues the same." *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938). No true conflict exists, however, among decisions where the facts are not substantially similar. The procedural record presented to the court of appeals in this case differs dramatically from that presented the courts of appeal in *Lindh* and *Drinkard*. Later decisions of the Fifth and Seventh Circuits discussing the prerequisites for application of section 2254(d)(1) make clear that had this case been presented to those courts, respondent's ineffective assistance of counsel claim would have been given plenary consideration. There is no conflict among the circuit courts necessitating this Court's grant of certiorari.

II.
CERTIORARI IS NOT NECESSARY BECAUSE RESOLUTION OF THE PURPORTED CONFLICT IS IRRELEVANT TO RESPONDENT'S ENTITLEMENT TO HABEAS CORPUS RELIEF.

Petitioner insists that certiorari is appropriate because the decision of the court of appeals in this case conflicts with those in *Lindh* and *Drinkard* regarding the interpretation of section 2254(d)(1). *Lindh* and *Drinkard* held that the first clause of section 2254(d)(1) -- "contrary to . . . clearly established Federal law" -- applies to only pure legal questions while the second "unreasonable application" clause governs review of all mixed questions of law and fact. *Lindh*, 96 F.3d at 870; *Drinkard*, 97 F.3d at 768. Because counsel's ineffectiveness is a mixed question of law and fact, and the court of appeals below never mentioned the word "unreasonable" in its opinion, petitioner argues, this court should grant certiorari to resolve the "conflict" between the circuit courts.

However, resolution of this alleged conflict is irrelevant to the ultimate outcome of respondent's case. Even if the Ninth Circuit were to use the analysis employed by other circuit courts to determine whether a state court's denial of an ineffective assistance of counsel claim was an "unreasonable application" of *Strickland* under section 2254(d)(1), respondent would still be entitled to relief. Thus, assuming *arguendo* that the prerequisites for application of section 2254(d)(1) to respondent's case exist, and that a conflict exists between the decision below and *Lindh* and *Drinkard* regarding the interpretation of section 2254(d)(1), the petition for writ of certiorari should still be denied. This court need not grant certiorari simply because the court of appeals did not use the magic word "unreasonable."

Since the enactment of the AEDPA, two other courts of appeal have applied the Act to ineffective assistance of counsel claims and nonetheless granted relief. *See Hall v. Washington*, ___

F.3d ___, 1997 WL 42967 (7th Cir. Feb. 4, 1997); *Berryman v. Morton*, 100 F.3d 1089 (3rd Cir. 1996). In each of these cases, the court applied the standard of review petitioner seeks to have applied to respondent's case -- whether the state court's decision was an "unreasonable application" of federal law.[1] Both courts reviewed the record in great detail, and independently determined that the state prisoner had established a Sixth Amendment violation under *Strickland* in large part because counsel had failed to investigate and present critical evidence. *Hall*, 1996 WL 42967 at *7-11 (failure to investigate and present evidence in mitigation of penalty in capital case); *Berryman*, 100 F.3d at 1093 (failure to investigate and present evidence that would have cast substantial doubt upon victim's identification of petitioner as perpetrator). In each, upon determining that the habeas petitioner had established a Sixth Amendment violation, the court perfunctorily concluded that relief was required notwithstanding the AEDPA's amendment of section 2254(d)(1).

For example, in *Berryman*, the Third Circuit held that trial counsel's

> performance was severely deficient and his errors were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, at 687. As a result of his errors Berryman was deprived of a fair trial. *Id.* Given that woefully inadequate and deficient performance and the prejudice that performance caused Berryman, we cannot uphold the state court's determination that trial counsel had a reasonable trial strategy. That

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[1] This is not to say that both courts have held that the "unreasonable application" standard applies to mixed questions of law and fact. *See Berryman*, 100 F.3d at 1104 (declining to determine the amount of deference that federal courts must afford to state court decisions because "we are convinced that even if we apply the standard of review for state court resolution of mixed questions of fact and law discussed in *Lindh v. Murphy*, Berryman would prevail.")

determination was clearly an unreasonable application of *Strickland* to the facts of this case.

Berryman, 100 F.3d at 1104. Similarly, in *Hall*, once the court determined that counsel was ineffective under *Strickland*, it concluded without further discussion that "the state court's finding that Hall's counsel provided effective assistance at sentencing 'involved an unreasonable application of clearly established Federal law' as determined by the Supreme Court." *Hall*, 1997 WL 42967 at *6. As the Seventh Circuit explained, the "unreasonable application" standard does not require a federal habeas court to defer in all cases to the state court's decision. Rather, "[s]ome decisions will be at such tension with governing U.S. Supreme Court precedents . . . that a writ must issue." *Id.*

If the "unreasonable application" analysis used in *Berryman* and *Hall* is applied to respondent's ineffective assistance of counsel claim, respondent is nonetheless entitled to habeas relief. As in both *Berryman* and *Hall*, the Ninth Circuit reviewed the record in great detail and independently determined that respondent's trial counsel was ineffective under *Strickland*. As in *Berryman*, given counsel's "deficient performance and the prejudice that performance caused," the state court's denial of relief to Baylor "was clearly an unreasonable application of *Strickland* to the facts of this case." *Berryman*, 100 F.3d at 1104. Moreover, the state court's denial of relief on respondent's ineffective assistance of counsel claim is "at such tension with governing U.S. Supreme Court precedents . . . that a writ must issue." *Hall*, 1997 WL 42967 at *6. Accordingly, even if the Ninth Circuit had used the "unreasonable application" analysis employed by the Third and Seventh Circuits in *Berryman* and *Hall* to review the state court's denial of respondent's ineffective assistance of counsel claim, respondent nonetheless is entitled to relief. This court need not grant the petition for writ of certiorari to resolve a "conflict" such as this.

III.
THE PETITION PRESENTS NO IMPORTANT QUESTION OF STATUTORY INTERPRETATION BECAUSE THE COURT BELOW PROPERLY CONSTRUED AMENDED 28 U.S.C. § 2254(d)(1).

The court of appeals applied the correct standard when it determined the state court's decision denying respondent relief was "contrary to" clearly established law as enunciated in *Strickland*. The construction of section 2254(d)(1) urged by petitioner and adopted by the courts of appeal in *Lindh* and *Drinkard* misreads the section's plain language, ignores its legislative history, and raises constitutional concerns.

A. Section 2254(d)(1)'s Plain Meaning.

Until the enactment of the AEDPA, federal courts were required to resolve *de novo* habeas petitioners' claims, whether those claims presented pure questions of law or mixed questions of law and fact. As a consequence, a state court's decision was treated as nothing more than "the conclusion of a court of last resort of another jurisdiction." *Brown v. Allen*, 344 U.S. 443, 458 (1953). Until 1989, moreover, a federal court could grant habeas relief on the basis of legal principles that were not in existence when the state court ruled. *Cf. Teague v. Lane*, 489 U.S. 288 (1989). And until the AEDPA was passed, federal courts could grant habeas relief on the basis of legal principles that never bound the state courts, i.e., federal circuit court authority developed in the absence of authority from this Court on point. Thus, prior to the AEDPA, the state court's previous resolution of the same claim in the same case was all but irrelevant.

Under petitioner's reading of the amendments to section 2254(d)(1), the AEDPA not only rescued the decisions of state courts from near irrelevancies; it relegated federal courts to the status of near rubber stamps. The appropriate interpretation of section 2254(d)(1)'s plain language,

however, allows federal courts to respect state court decisions without also withdrawing the independence of the federal judiciary.

Properly interpreted, section 2254(d)(1) changes federal habeas review in three ways. First, section 2254(d)(1) makes the state court decision the focus of federal review. The federal court must review the state court "*decision*" on the basis of the governing "Federal law," and if that decision was correct, it is the law of the case. Second, under section 2254(d)(1), the only "Federal law" to which the state court decision may be compared is "clearly established law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This feature unqualifiedly limits federal review to legal rules in effect when the state court decided the case. Third, under section 2254(d)(1) the federal court must deny relief unless its review of the state decision reveals one of two defects: (1) the decision was "contrary to" clearly established Supreme Court law; or (2) involved an "unreasonable application" of that law.

While *Lindh* and *Drinkard* correctly determined that the two distinctive clauses of section 2254(d)(1) have independent work to do, those decisions misconstrue the assignment Congress gave to each clause. The first clause, requiring federal judges to determine whether the state court decision was "contrary to" clearly established Supreme Court law, can *only* apply when the body of law established by this Court includes a rule designed to govern the habeas petitioner's claim. If no such rule exists, the second clause of section 2254(d)(1) delineates the analysis to be employed: the state court decision will stand unless the state court acted unreasonably in fashioning its own rule from this Court's pertinent precedents.

Thus, under the plain language of section 2254(d)(1), a federal court must determine, in reviewing a state court's decision, whether this Court has clearly prescribed a rule for claims of the

sort petitioner presented. If so, the federal court asks whether the state court decision was contrary to that clearly established Supreme Court precedent. If there was no established Supreme Court precedent, then the federal court must determine whether the state court unreasonably applied the Supreme Court law that was available.

Here, the Ninth Circuit interpreted new section 2254(d)(1) correctly. It determined that this Court had clearly prescribed a rule for respondent's ineffective assistance of counsel claim in *Strickland*. Because the state court's decision was "contrary to" *Strickland*, respondent was entitled to federal habeas relief.

In the view of petitioner, as well as the courts of appeal in *Lindh* and *Drinkard*, however, section 2254(d)(1) operates differently. Under this view, the "contrary to" clause applies only to determine if the state court identified the correct rule of decision, while the "unreasonable application" clause applies to the review of all mixed questions of law and fact. *See Lindh*, 96 F.3d at 870; *Drinkard*, 97 F.3d at 768. This view is contrary to the plain language of section 2254(d)(1).

Under each clause of section 2254(d)(1), the focus of the federal court's review is the state court *decision*. Decisions are "conclusion[s] of law upon facts." Black's Law Dictionary 842 (6th ed. 1990). Petitioner, *Lindh* and *Drinkard* trivialize the "contrary to law" clause by focusing the federal court's review only on the legal rule that the state court actually articulated.

Moreover, Congress and the courts routinely use the phrase "contrary to law" to establish a mode of adjudication for use by one court in reviewing the decisions of another. For example, district court judges are required to review certain magisterial decisions to see if they are "contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). Circuit courts use the same phrase to describe their review of district court legal decisions under Fed. R. Civ. P. 52(a). In both contexts, the phrase

"contrary to law" is consistently understood to require plenary, *de novo* review of all legal issues, whether "pure" or "mixed."

Indeed, mixed questions of law and fact, including the counsel's effectiveness, have long been "ranked as issues of law." *Thompson v. Keohane*, 116 S.Ct. 457, 465 (1995). This Court has noted that very often "the relevant legal principle can be given meaning *only* through its application to the particular circumstances of a case." *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (emphasis added). The conclusion of the *Lindh* court -- that a dispute over a mixed question of law and fact is not a "dispute [that] lies in the meaning of the Constitution," 96 F.3d at 870 -- is at odds with this Court's longstanding jurisprudence.

Finally, section 2254(d)(1) fails to use the term of art reserved for mixed questions: application of a legal standard *to the facts*. Instead, the "unreasonable application of . . . law" language Congress enacted is similar to that which this Court has used to describe its review of rules fashioned by lower courts in the absence of controlling Supreme Court authority. *See Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (if legal principles on which prisoner relies are only broadly relevant, habeas relief may not be granted unless state court decision was a "begrudging or unreasonable application of these principles.")

The Ninth Circuit's interpretation of section 2254(d)(1) -- that habeas relief is required when a state court decision that a state prisoner was not denied the effective assistance of counsel is "contrary to" *Strickland v. Washington* -- is consistent with the statute's plain language.

B. Section 2254(d)(1)'s Legislative History.

The legislative history of section 2254(d)(1) not only establishes the correctness of the Ninth Circuit's analysis, but also demonstrates conclusively that Congress did not intend the pure/mixed

question dichotomy employed by the *Lindh* and *Drinkard* courts. Congress expressly failed to enact legislation that would have directed habeas courts to act just as *Lindh* and *Drinkard* have mistakenly construed section 2254(d)(1) to operate.

The AEDPA's habeas title began as part of the crime bill passed by the House as H.R. 729. *See* 141 Cong. Rec. H1404 (Feb. 8, 1995). In that measure, the House approved a standard that allows habeas corpus relief only if the state court's adjudication:

> (1) resulted in a decision that was based on an arbitrary or unreasonable *interpretation* of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; [or]
>
> (2) resulted in a decision that was based on an arbitrary or unreasonable application *to the facts* of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States[.]

Id. (emphasis added). This language, had it become law, would have codified the mixed/pure dichotomy both *Drinkard* and *Lindh* mistakenly imported into section 2254(d)(1). But when the legislation moved to the Senate, this language was discarded after "extended negotiations," *see* 141 Cong. Rec. S7803 (June 7, 1995) (Sen. Specter), and the present language of section 2254(d)(1) was inserted in its place.

Thus Congress considered and rejected the very standard petitioner propounds. It was entirely appropriate for the Ninth Circuit to have granted respondent habeas corpus relief upon its conclusion that the state court's denial of respondent's ineffective assistance of counsel claim was "contrary to" this Court's decision in *Strickland*.

C. Constitutional concerns.

Finally, the construction of section 2254(d)(1) employed by the courts of appeal in *Lindh* and *Drinkard* -- that habeas relief is unavailable on a mixed question of law and fact if the state court decision would be debatable among reasonable jurists -- raises serious Article III and Suspension Clause problems. Whether or not a claim presents a mixed question of law and fact, or one concerning a pure legal issue, "federal courts, even on habeas, have an independent obligation to say what the law is." *Wright v. West*, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). To provide jurisdiction and yet withhold from the habeas court the power to overturn judicial decisions that are contrary to this Court's settled doctrine violates Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Moreover, no federal judge has ever been required to review a legal decision under federal law, and yet leave it in force despite its conflict with that law. An essential function of the writ of habeas corpus is the preservation of the supremacy of federal law, and "if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

Thus, in interpreting section 2254(d)(1) to require the federal courts to grant habeas relief when the state court's decision was "contrary to" controlling Supreme Court precedent, the Ninth Circuit followed the "cardinal principle" that federal courts read statutes to avoid constitutional questions respecting their impact on federal jurisdiction. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). Certiorari is not necessary in this case.

CONCLUSION

Petitioner has failed to establish grounds for this Court to review the circuit court's decision.

The petition for writ of certiorari to review the judgment of the Court of Appeals should be denied.

DATED: February 19, 1997

Respectfully submitted,

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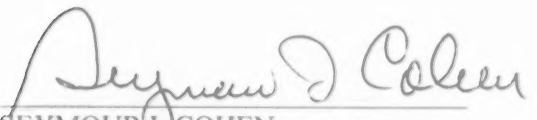
BY: 

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Counsel for Respondent

DECLARATION OF SERVICE BY MAIL

I, TERESA FLOWERS, declare:

I am a citizen of the State of California, over the age of 18 years and not a party to the within cause; my business address is 18411 Crenshaw Boulevard, Suite 411, Torrance, California, 90504.

I served a copy of the attached **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on each of the following, by placing same in an envelope addressed as follows:

ATTORNEY GENERAL OF CALIFORNIA
300 South Spring Street
North Tower
5th Floor
Los Angeles, CA 90013
Attn: ALENE M. GAMES, D.A.G.

RONNIE EARL BAYLOR
11725 S. Birch Ave. #C
Hawthorne, CA 90250

Each said envelope was then on February 20, 1997, sealed and deposited in the United States mail at Torrance, California, the County in which I am employed, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 20, 1997, at Torrance, California.

Teresa Flowers
TERESA FLOWERS